***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

74-1815 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

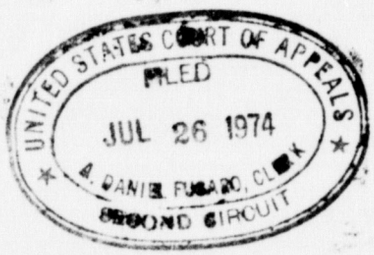
GEORGE W. HENDRICKS

Appellant.

Docket No. 74-1815

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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# BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## QUESTION PRESENTED

Whether the Court committed reversible error in failing to instruct the jury that knowledge that the checks were stolen was an essential element of the crime under the aiding and abetting theory of guilt.

## STATEMENT PURSUANT TO RULE 28(3)

### Preliminary Statement

This is an appeal from a judgment of the United States District Court of the Southern District of New York (The Honorable Robert J. Ward) rendered on June 4, 1974, convicting appellant, after a jury trial, of three counts of knowing possession of checks stolen from the mail, and sentencing him to four months imprisonment on each count, to run concurrently.

The District Court continued appellant released on bail pending appeal. The Legal Aid Society Federal Defender Services Unit was continued as counsel on appeal pursuant to the Criminal Justice Act.

### Statement of Facts

Appellant was charged* in a three count information with knowing possession of welfare checks stolen from the

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*The information is annexed as "B" to appellant's separate appendix.

mail in violation of 18 U.S.C. §1708. These acts allegedly occured on December 1 (counts one and two) and December 5, 1972 (count three)*. From the outset appellant conceded possession of the checks. However he vigorously contended that he had been informed and throughout believed the checks represented rent payments by welfare recipients living in buildings managed by the individuals who had given him the checks for deposit. Accordingly, the defense insisted that appellant did not know that the checks were stolen.

A. The Government's Case

The Government called fourteen payees who testified that they had not received their welfare check in December, 1972, that the signature on the rear of the check was not theirs, that they did not know the appellant, and that they did not authorize appellant or anyone else to sign their name (40-94**). In addition, two of the witnesses tes-

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*The information alleges fourteen separate checks in support of count one, sixteen in support of count two and twenty-six in support of count three. However, at trial the Government introduced testimony relating to only fourteen checks and accordingly the remaining checks were struck from the information.

**Numerals in parentheses are references to pages of the trial transcript.

tified that on or about the date that the checks were to be delivered their mail boxes* had been broken into (41, 48). The fourteen checks were admitted into evidence without objection. (Government Exhibit 26 (41), 31 (48), 39(54), 16 (59), 32 (61), 6 (66), 22 (68), 1 (72), 33 (74), 2 (77), 14 (79), 34 (85), 25 (88), 36 (90).**

The Government's two remaining witnesses testified primarily to conversations held with the appellant concerning welfare checks deposited in his bank account.

Walter Donohue, the manager of The Banker's Trust Company branch in the Bronx, where appellant maintained an account, testified that appellant opened a commercial account there on May 8, 1969 (10-12, 20). He stated that sometime in October 1972 he had a conversation with appellant on the bank floor (12) wherein he informed appellant that certain welfare checks deposited to his account had been returned (23, 24).***

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*The parties stipulated that if an appropriate official of the New York City Department of Social Services were called he would testify that these checks were mailed in the ordinary course of business (Government Exhibit 69)(109).

**In addition three payees not named in the information similary testified to non-receipt of checks on the theory that these were similar acts admissible on the issue of knowledge and intent (92-106).

***Donohue made no notes of this conversation and was only able to recall the "general trend" of the conversation rather than what was actually stated (24). Moreover, it was not until March 1973 that he was first asked to recall the incident (21).

Donohue stated that appellant responded that he was in the real estate business and that he was having a problem with his tenants (24). Donohue stated that there was nothing "unusual" about welfare checks being deposited in a commercial account maintained by a landlord, such as appellant (26). He further stated that a reported theft is the main reasons for a stop payment order on a welfare check. However, as he acknowledged, often a welfare recipient will cash the check and then report it stolen so that he can receive a double payment (27-30). Donohue estimated that during 1972 and 1973* a total of approximately $28,500 in welfare checks were deposited for collection in appellant's account and subsequently returned to Bankers Trust as uncollectable because reported stolen (34-35).

Ellsworth Kearney, a special investigator with the United States Postal Service testified to conversations which he had with appellant on March 26th and May 16, 1973; the latter being the date of appellant's arrest on the within charge (109-110).

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*Donohue stated appellant's bank account was closed on May 3, 1973.

On March 26, 1973 he and Inspector Cannon spoke to the appellant at his house (110). He informed appellant that they were investigating stolen welfare checks which had been deposited in his bank account.* According to Kearney, appellant responded that the checks were from his tenants (111)**. Kearney stated that he had previously interviewed the payees on the checks and that they did not know appellant. Appellant then stated that he was simply doing some persons a "favor" by depositing the checks in his account (111). Although appellant refused to disclose the identity of the persons he assured Kearney that he would contact him at a later date and arrange to discuss it at Kearney's office (127). Kearney acknowledged that appellant and his attorney later visited his office, however both Kearney and Inspector Cannon were unavailable at the time and therefore no subse-

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*Additionally Kearney stated that he first showed appellant his "warning and waiver form." Appellant refused to sign the waiver but stated he understood what his rights were and proceeded to answer the questions (111).

**This conversation was never alluded to in the witness' grand jury testimony or in any written reports or notes made by Kearney (125-126).

quent meeting was held (131). Kearney also acknowledged that on another occasion his office received a call from appellant's attorney who was attempting to arrange a meeting (131).

Kearney's next conversation with appellant occured on the date of arrest, May 16, 1973. Appellant was interviewed at the postal inspector's office in the Bronx and later at the office of the United States Attorney (112).

After being advised of his rights on each occasion (112, 113) appellant stated that Arthur Cohen* to whom he was indebted, had requested as a "favor" that appellant deposit some rent checks received from welfare tenants in appellant's bank account because there was "something wrong" with his own bank account (113). Following Cohen's death in December 1972** appellant stated that he was contacted by a man named Rosen, who identified himself as Cohen's partner. At Rosen's request appellant agreed to continue the same arrangement concerning the rent checks and in return

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*Kearney verified from his investigation there was an Arthur Cohen who was in the real estate business in the Bronx.

**The Government stipulated that Arthur Cohen was found shot to death on December 16, 1972 on East 154th Street in the Bronx (234).

Rosen agreed to reduce appellant's indebtedness* by $100 for each withdrawal of money from appellant's account (114). Appellant stated that he had no way of reaching Rosen but that Rosen would contact him by phone and they would then meet at a bar on Courtland Avenue (114). Appellant further stated, according to Kearney, that the last withdrawal from this account was made in the amount of $5,000 and turned over to Rosen a few weeks prior to the agent's March 26th visit (114-115). Appellant further stated that two weeks before his arrest he withdrew money from the account, part of which was turned over to Rosen, and $1,000 of which was used by appellant to pay property taxes on a building which he owned. Appellant also stated that the final deposit to the account was made by him on March 16** (115).

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*On Cohen's death, appellant was told that the remaining balance of indebtedness became due and owing to Rosen, his partner.

**Thereafter the Government introduced bank statements which reflected the activity in the account during the period March 3 through May 2, 1973 (Government Exhibits 66 & 67). These reflect a $5,000 withdrawal on March 23, a $3,000 withdrawal on March 27, and a $2,000 withdrawal on April 12. On March 16 there were deposits of $4,469.25 and $1,096.45 (114-115).

Thereafter the Government rested its case (137).

Defense motion for a directed verdict of acquittal was denied (139).

B. The Defense

The defense called two witnesses; the defendant and his wife.

Dorothy Hendricks testified that she has been married to the defendant for eight years, that they have three children and live together at 1060 Morris Avenue in the Bronx (153). She stated that her husband bought his first apartment building in 1968 and that in 1969 he purchased three other buildings*, including their present home which is a two-family dwelling. She testified that between June 1972 and May 1973 there were no unusual amounts of money coming into the family and that to the contrary, the family economic situation worsened during this period because of costly building repairs and a loss of tenants (156-157).**

The appellant testified that some eight years prior, while working as a general contractor, he first met Arthur

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*Two houses were destroyed by fire in 1970 (154-155).

**The Hendrick's joint income tax returns for 1972 and 1973 (Defendant's Exhibits M and P) reflect income of $16,380 in 1972 and $10,058 in 1973 (193).

Cohen, the owner and manager of several apartment buildings in the Bronx (167). Appellant stated that in March, 1972 he borrowed $2,000 from Cohen in order to pay real estate taxes and make repairs on one of his buildings. It was understood that the loan plus $200 interest was to be repaid within one year (168).

In June 1972, having lost several tenants, appellant was unable to make the monthly payment on this loan. Cohen agreed to accept a lesser payment for that month but in return asked a "favor" of appellant (170). Cohen explained that his bank account was "tied up" and that he needed some cash to buy oil* for his buildings (170, 212) and asked appellant to deposit to his (appellant's) bank account some welfare checks which he (Cohen) had collected as rent from tenants in his (Cohen's) buildings.

In June appellant received checks from Cohen in the amount of approximatedly $350. These checks and the one which followed were signed on the rear prior to appellant's receipt. Appellant stated he never checked the source of these checks (208) or studied the address on the front but merely endorsed each

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*Later when the amounts grew larger Cohen explained that he needed the money for his personal use (181).

by stamping it on the rear and deposited to his account (214, 229). For this service Cohen reduced appellant's debt depending on the amount of checks deposited and withdrawn from appellant's bank account during the month*(176).

Appellant stated that following the October 1972 conversation with Donohue at Bankers Trust he went back to Cohen and specifically inquired as to the reason for the return of these welfare checks. He stated that Cohen assured him that the checks were reported stolen by his (Cohen's) tenants in an attempt to receive double payments in anticipation of the Christmas season (183).

In December 1972 Cohen was killed and appellant was thereafter contacted by Cohen's partner, Rosen, who continued the same arrangement regarding the checks (185). Rosen also affirmed that the checks represented rent payments from tenants who were on welfare (187-188) which appellant believed up until the date of his arrest.

Appellant further stated that following the postal investigators' visit to his home on March 26th** he con-

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*Appellant testified that reduction of the debt for use of his account varied between $25 and $50 per month (225).

**Appellant flatly denied stating to Kearney on March 26th, that the returned checks were from his own tenants (199).

tacted Rosen who agreed to go down to Kearney's office with appellant and his lawyer,* and explain where the checks came from (197-199). Although appellant and his lawyer appeared, Rosen never showed (199). Appellant's counsel attempted to arrange another meeting. However this never occured and appellant was subsequently arrested on May 16,

C. The Charge

The Court instructed the jury that appellant could be convicted as a principal or as one who aids and abets another The aiding and abetting portion of the charge states:

> When I read the information I mentioned another section of the United States Code. Title 18 of the United States Code, Section 2, which is also charged in the indictment, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find George W. Hendricks guilty of the offense charged in Counts

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*Appellant further stated that following the March 26th meeting he withdrew and turned over to Rosen $5,000 from his account.

> 1, 2 and 3 if you find beyond a reasonable doubt that the Messrs. Cohen and Rosen, or Mr. Cohen or Mr. Rosen, committed the offense and that George W. Hendricks aided and abetted them.
>
> To determine whether a defendant aided and abetted in the commission of an offense, you will ask yourself these questions:
>
> Did he associate himself with the venture?
>
> Did he participate in it as something he wished to bring about?
>
> Did he seek by his acts to make it succeed?
>
> If he did, then he is an aider and abetter.
>
> (285)

This instruction was duly excepted to by defense counsel on the ground that it "removed the element of know ledge from the defense". (305).

Thereafter, during its deliberations the jury requested clarifying instructions relating to the "point of law in reference to 'aiding' and 'abetting' " (327). In response the Court instructed the jury as follows:

I will charge on the matter of aiding and abetting in a briefer form than I charged in the main charge, but I think it will cover the point of your query. If after I have charged on this subject you want a further explanation, I would appreciate your retiring to the jury room and sending me another note. I have gone over the proposed supplement to my charge with counsel and I find it agreeable to them and I think it will answer your note.

Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime, a person must associate himself with the criminal venture, participate in it and try to make it succeed.

That completes my charge on aiding and abetting. I will request the jury to return to the jury room to continue their deliberations.

If you find that you wish more on that subject, or any o other, I will be available to you just as soon as I receive a further note from you.

(327)

Some twenty minutes later the jury returned with a verdict of guilty on all counts of the information (328).

## ARGUMENT

THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY THAT KNOWLEDGE THAT THE CHECKS WERE STOLEN WAS AN ESSENTIAL ELEMENT OF THE CRIME UNDER THE AIDING AND ABETTING THEORY OF GUILT.

From the opening statement to the jury through the defendant's testimony at trial, the defense maintained that, although appellant possessed the checks in question and deposited them for collection in his bank account, he did not know that they were stolen. Whether appellant had such guilty knowledge was the sole issue in dispute at trial.

In his charge the Court instructed the jury that they could find appellant guilty on alternative theories: as a principal, or, as an aider and abettor (18 U.S.C. §2). While the Court properly instructed that knowledge that the checks were stolen was an essential element to convict appellant as a principal, it did not so charge as to a conviction on the aiding and abetting theory. Specifically, the aiding and abetting portion of the Court's charge states:

> To determine whether a defendant aided and abetted in the commission of an offense, you will ask yourself these questions:

> Did he associate himelf with the venture?
>
> Did he participate in it as something he wished to bring about?
>
> Did he seek by his acts to make it succeed?
>
> If he did, then he is an aider and abetter.
>
> (285)

Defense counsel properly excepted to this instruction.

By focusing exclusively on appellant's participation in the events, which the defense conceded, and refusing to charge that knowledge of the stolen nature of the checks was an essential element under the aiding and abetting theory, the Court enabled the jury to convict without resolving the sole and critical issue of fact.

It is beyond dispute that the element of knowledge to establish guilt as a principal is equally essential to guilt premised on the aiding and abetting theory.

> [18 U.S.C. §2] defines a principal for purposes of the federal criminal code, and its effect is to erase whatever distinctions may have previously existed between different classes of principals and aiders or abettors. The section does not create new substantive offenses. It merely

> states who the actors are that are punishable as violators of federal penal statutes. In short, if a certain knowledge or intent is required to be proved in order to convict one of violating a federal criminal statute, the proof to convict one as an aider or abettor will not be different from that necessary to convict the violator, except that aiding, abetting, commanding, inducting, or procuring the commission of the crime must be proved rather than actual commission.... In light of this, we cannot hold that if one element of knowledge must be established to convict a principal that knowledge need not be proven to convict as an aider and abettor.
>
> United States v. Jones, 308 F.2d 26, 31-32 (2d Cir. 1962) (en banc). (Emphasis added.)

This principle was applied in United States v. Docherty, 468 F.2d 989 (2d Cir. 1972) where this Court reversed a conviction for aiding and abetting in the misapplication of bank funds by a bank officer (18 U.S.C. §656). The Court noted that "to support a conviction for 'aiding and abetting' in a 'wilful misapplication', the alleged aider or abettor must have knowledge that the officer intended to effect a conversion." Id. at 99. There being insufficient proof on this score the Court reversed.

The Court below chose to ignore the essential element of knowledge as a pre-requisite of guilt on the aiding and abetting theory. Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1949); United States v. Terrell, 474 F.2d 872 (2d Cir. 1973); United States v. Docherty, 468 F.2d 989 (2d Cir. 1972); United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962); United States v. Turnispeed, 272 F.2d 106 (7th Cir. 1959); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). Instead the Court focused exclusively on the element of participation in the events, which appellant did not dispute. This Court has been especially prone to reverse in situations such as this, where, under the aiding and abetting theory, the charge focuses on what is least contested and silent as to the real issue in dispute.

This is clearly seen in United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962) where the charge on aiding and abetting focused exclusively on the element of knowledge. The Court noted that a sharply disputed issue at trial was whether Macchia had actually participated in the commission of the crime (the making of counterfeit bills, 18 U.S.C. §474). On this point the charge was silent. Here, the converse situation is presented. The aiding and abetting charge focused

entirely on appellant's participation in the events, which are conceded, while ignoring the question of whether he knew that a crime was being committed. There as here, the error was further highlighted by the jury's request for additional instructions on aiding and abetting. There, unlike the case here, there was no proper exception to the charge and the Court was compelled to rely on plain error to reverse* the conviction. Federal Rules of Criminal Procedure 52(b).

That the ensuing verdict of guilty is premised on the aiding and abetting theory and therefore on the fatally deficient aiding and abetting charge is evident from the fact that after approximately four hours of deliberations without reaching a verdict, the jury, by note, requested clarifying instructions on "the point of law in reference to 'aiding and abetting' ". The Court gave a somewhat abbreviated version** of the original instructions on this

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*Following Garguilo this Court reached a similar result in United States v. Terrell, 474 F.2d 872 (2d Cir. 1973), where it reversed as to the defendant, MacDonald, whose guilt was based on the aiding and abetting theory.

**After reading the statute, 18 U.S.C. §2(a), the Court stated, "In order to aid or abet the commission of a crime a person must associate himself with the criminal venture, participate in it and make it succeed." (327)

point, again focusing exclusively on the element of participation without mention that guilty knowledge was also a requisite. Thereafter, the jury retired to deliberate and within twenty minutes returned with a guilty verdict on all counts.*

## CONCLUSION

For the above reasons, the case should be reversed and remanded to the District Court for a new trial.

Respectfully submitted,

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*Reversal is mandated even where, unlike here, it is unclear whether the jury followed the deficient alternative theory of guilt. Leary v. United States, 395 U.S. 6, 31-32 (1969); United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972).